84-931

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DAVID K. GUENTHER,

Petitioner,

vs.

MARK HOLMGREEN and CITY OF BLACK RIVER FALLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER

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87 pp

QUESTION PRESENTED

When does a state court finding of probable cause to arrest collaterally estop relitigation of the issues of probable cause and good faith in a §1983 action for damages?

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OPINIONS BELOW

The memorandum and order of the district court (Pet. App. A1-A21) granting defendants' motion for summary judgment is reported at 573 F. Supp. 599 (W.D. Wis. 1983). The opinion of the court of appeals (Pet. App. A22-A39) is reported at 738 F.2d 879 (7th Cir. 1984).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1984. No petition for rehearing was filed. Upon consideration of petitioner's motion for extension of time, on October 11, 1984 the Court ordered (Pet. App. A40-A41) that the time for filing this petition would be extended to and including December 6, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding

> for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioner was arrested without a warrant in 1982 on two misdemeanor criminal charges, disorderly conduct and resisting arrest, by respondent Mark Holmgreen, a police officer employed by respondent City of Black River Falls, Wisconsin. Petitioner had been assaulted in a fairgrounds pavilion by a fellow patron of a summertime music festival; the charges against him stemmed from events following the assault. Respondent Holmgreen was present at the scene.

Petitioner moved to dismiss the criminal proceeding on the ground that respondent Holmgreen unlawfully arrested

petitioner in the pavilion without probable cause, in violation of Wis. Stat. §968.07, Wis. Const. art. I, §§8, 11 and U.S. Const. amend. 4, 5, 14. After an evidentiary hearing at which Holmgreen and four others testified, the court denied the motion from the bench, finding that respondent had probable cause to arrest petitioner outside the pavilion (App. A51-A52).

In February of 1983 a jury acquitted petitioner on disorderly conduct and failed to reach a verdict on the other count.

Petitioner brought a §1983 damage action against respondents Holmgreen and the City of Black River Falls in March of 1983. He claimed damages for deprivation of his liberty without due process and for violation of his substantive Fourth

Amendment right to be free from unreasonable searches and seizures.[1] Petitioner's substantive Fourth Amendment claim was based upon his belief that Holmgreen arrested him in the pavilion without probable cause, not outside the pavilion, and thereafter fabricated the existence of probable cause in an arrest report, in the criminal complaint, and at the state court hearing on the motion to dismiss.

Respondent sought summary judgment. The district court granted this motion, holding that Parratt v. Taylor, 451 U.S. 527 (1981), was dispositive of the procedural due process claims and that petitioner was collaterally estopped from

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[1]Only the violation of petitioner's substantive Fourth Amendment right is before the Court.

relitigating the substantive Fourth Amendment issue (Pet. App. A5-A7, A20).

The court of appeals affirmed the district court, relying on Allen v. McCurry, 449 U.S. 90, 102 n.18 (1980). The court held that a "'state court decision that the police acted legally [i.e., with probable cause] cannot but foreclose a [§ 1983] claim that they acted in bad faith'" (Pet. App. A30). Notwithstanding the Court's admonition in Haring v. Prosise, 103 S.Ct. 2368, 2375 (1983), that redetermination of issues may be warranted when there is reason to doubt the quality, extent or fairness of a prior hearing, the court of appeals held that "the trial court's finding of probable cause to arrest Guenther... necessarily depended on the trial court's determination that Holmgreen had truthfully

stated the factual bases for probable cause" (Pet. App. A30). The court of appeals recognized that Haring v. Prosise, 103 S.Ct. at 2372-73, required application of Wisconsin's collateral estoppel law (Pet. App. A28).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION ON AN IMPORTANT QUESTION CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND MISCONSTRUES AN APPLICABLE SUPREME COURT OPINION.

The application of the doctrine of collateral estoppel to §1983 suits against police officers to recover for Fourth Amendment violations was the subject of the Court's decision in Allen v. McCurry, 449 U.S. 90 (1980). In Allen, the Court held that collateral estoppel rules were generally applicable in §1983 actions. Allen, however, did

not resolve the thorny issues that arise when collateral estoppel rules are applied to §1983 actions.

The Court in Allen did not consider precisely how collateral estoppel doctrine or 28 U.S.C. §1738 should apply in a §1983 case stemming from Fourth Amendment violations. 449 U.S. at 105 n.25. That issue was directly addressed in Haring v. Prosise, 103 S.Ct. 2368, 2373 (1983). In Haring, the Court held that the federal courts are required to give issue-preclusive effect to a state court judgment whenever that state's courts would do so. 103 S.Ct. at 2373.

Allen also did not require the Court to consider the preclusive effect in a §1983 action of a state court judgment when the litigant could have raised a federal issue in the state proceeding but

did not do so. 449 U.S. at 97 n.10. That issue was addressed in Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 897 (1984). The Court followed the reasoning of Haring and other recent cases and held that a state court judgment has the same claim-preclusive effect in federal court that it would have in the courts of the rendering state. 104 S.Ct. at 898.

The Court in Allen also reserved consideration of an additional area of concern: When do exceptions or qualifications to the general rule of collateral estoppel apply in §1983 actions? 449 U.S. at 95 n.7. The Court stressed that "one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier deci-

sion is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." Allen v. McCurry, 449 U.S. at 95, quoting Montana v. United States, 440 U.S. 147, 153 (1979).[2]

The instant case would permit the Court to consider when a state court's denial of a motion to dismiss for lack of probable cause will bar a §1983 action against a police officer to recover for infringement of a substantive Fourth Amendment right derived from Franks v. Delaware, 438 U.S. 154 (1978). It would permit the Court to consider if it can be said that a finding of probable cause collaterally estops a Franks v. Delaware claim. It would also permit the Court to

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[2]McCurry had not argued that he had been denied a full and fair opportunity to litigate his search and seizure claim. 449 U.S. at 91.

guide the federal courts in applying the body of a state's collateral estoppel law instead of the state's verbal "test."

Application of the principle of collateral estoppel in §1983 actions reduces unnecessary litigation, fosters finality and promotes comity. Allen v. McCurry, 449 U.S. at 95-96. But the important goals of §1983 actions, see Patsy v. Board of Regents, 457 U.S. 496, 502-507 (1982); Mitchum v. Foster, 407 U.S. 225, 241-242 (1972); Monroe v. Pape, 365 U.S. 167, 180 (1961), are protected only when the doctrine of collateral estoppel is not misused.

A. The Decision Of The Court Of Appeals Conflicts In Principle With Decisions Of Other Courts Of Appeals.

The court of appeals held that a prior state court determination that

petitioner's arrest was supported by probable cause precluded petitioner's §1983 claim that the police officer acted without probable cause and in bad faith. The court relied heavily upon the statement in Allen v. McCurry that "a state-court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith." 449 U.S. at 102 n.18. The courts of appeals are not in agreement on the question whether a state court determination of probable cause to support an arrest forecloses a §1983 action grounded on unlawful arrest.

The decision of the court of appeals in the instant case is in conflict in principle with McCarthy v. Kleindienst, 741 F.2d 1406, 1413 n.8 (D.C. Cir. 1984). The plaintiffs in McCarthy sought class certification in an action against

government and District of Columbia officials for common law tort and constitutional claims, including violation of their Fourth Amendment rights. An earlier lawsuit in the District of Columbia federal court had determined that the plaintiffs' arrests had been without probable cause. In the class action the plaintiffs argued that the determination of the lawsuit would not turn on highly individualized facts, because the defendants would be collaterally estopped from litigating the factual issue of probable cause, due to the prior ruling.

The court of appeals held that the defendants would not be collaterally estopped from litigating the legality of the arrests, even though there had been a prior court determination that the arrests had been made without probable

cause. 741 F.2d at 1413 n.8. The court of appeals said that collateral estoppel would not apply because the earlier lawsuit had been limited to equitable relief -- expungement of arrest records -- and "the stakes in the present case are much different given the claims for money damages," giving the defendants greater incentive to litigate. 741 F.2d at 1413 n.8.

The decision in the instant case conflicts with McCarthy because the McCarthy court found that collateral estoppel would be inapplicable even though probable cause had actually been litigated. Had petitioner Guenther brought his §1983 action in the District of Columbia, McCarthy would have allowed the action to proceed.

The decision of the court of appeals

in the instant matter is also in conflict in principle with Krohn v. United States, 742 F.2d 24, 30-31 (1st Cir. 1984). Krohn had been arrested and released on several state and federal warrants. Part of his claims under §1983 pertained to 1974 warrants and detentions. He claimed that his Fourth Amendment rights had been violated because of intentional or reckless misrepresentations contained in the arrest warrant, relying on Franks v. Delaware.

In 1977, a federal district court had considered Krohn's motion for speedy trial in a prior proceeding and had specifically ruled that the 1974 arrest was legal. The defendants in Krohn's §1983 action alleged that the decision on the legality of the 1974 arrest collaterally estopped Krohn from litigating the issue

in his §1983 action.

The court of appeals rejected the defendants' claim, notwithstanding the prior explicit finding that the arrests were legal. The court declined to give collateral estoppel effect to the prior decision for three reasons: the court was "not convinced" that the prior district court "actually found there was probable cause for the 1974 arrest"; the prior finding was not essential to the determination of the speedy trial motion pending before that court; and the prior decision had never been appealed. 742 F.2d at 31.

The instant case is in conflict with Krohn because Krohn rejects application of the doctrine of collateral estoppel even though there had been an express finding of probable cause. Krohn reasons

that the finding of probable cause was not necessary to the determination of the speedy trial motion. Likewise, in the instant case, consideration and rejection of claims under Franks v. Delaware, claims which petitioner never expressly raised in that forum, were not necessary to the decision that the requirements of probable cause under the Fourth Amendment had been met.

Because of the conflict in principle among the courts of appeals on the collateral estoppel effect of a prior determination of probable cause, consideration of the issue by this Court is warranted.

B. The Decision Of The Court Of Appeals Is The Product Of A Legal Fiction.

The court of appeals held that claim-preclusive collateral estoppel effect would be given to the state court

finding of probable cause. This holding was erroneous because the issue at the heart of petitioner's §1983 claim was neither necessary to the state court's determination of probable cause nor actually determined by the state court.

Petitioner's §1983 claim does not neatly fit into the mold of Franks v. Delaware, 438 U.S. 154 (1978), contrary to the court of appeals' assumption (Pet. App. A30). In Franks, the Court held that a facially sufficient search warrant may be challenged as invalid if the affiant made intentional or reckless misrepresentations or misstatements of fact. 438 U.S. at 171-72. In the instant case, there was no arrest warrant affidavit. The misrepresentations that would have been placed at issue in the §1983 action were misrepresentations

about the factual basis for the arrest and, concomitantly, misrepresentations as to the moment the arrest occurred. These misrepresentations, contained in an arrest report and in the criminal complaint, would in this case become the equivalent of the warrant affidavit in the Franks case.[3]

The court of appeals imposed a legal fiction that a probable cause challenge necessarily requires a state court to rule on a misrepresentation issue such as petitioner's. The court found a source for this sleight of hand in Franks itself and in Allen v. McCurry. From Franks, the court relied upon the following statement: "when the Fourth Amendment

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[3]This functional equivalency is confirmed by Wis. Stat. §968.02(2) (1981-82), which requires the issuance of a warrant after issuance of a complaint.

demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a truthful showing" (Pet. App. A30) (emphasis in original). See Franks v. Delaware, 438 U.S. at 164-65, quoting United States v. Halsey, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966). From McCurry, the court drew the following: "a 'state court decision that the police acted legally [i.e., with probable cause] cannot but foreclose a [§ 1983] claim that they acted in bad faith'" (Pet. App. A30) (footnote omitted) (alterations by the court of appeals). See Allen v. McCurry, 449 U.S. at 102 n.18.[4] Synthesizing these two statements, the court of appeals was able to conclude that any determination of

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[4]Probable cause to arrest was not at issue in McCurry.

probable cause to arrest constituted a determination of all Franks v. Delaware-like issues.

The court of appeals complicated its analytical error by suggesting that because petitioner had vigorously cross-examined respondent Holmgreen he had litigated his misrepresentation claim (Pet. App. A29-A30). The court concluded that petitioner was given a "full and fair opportunity" to present and examine witnesses at the motion hearing (Pet. App. A31).

The "full and fair" opportunity that petitioner was given, plus his vigorous cross-examination of respondent Holmgreen, cannot be used to collaterally estop him in his §1983 action when the issue that was litigated and decided by the state court was not his misrepresentation claim.

Because of the court of appeals' incorrect understanding of Franks and McCurry, the Court should consider this case.

C. The Decision Of The Court Of Appeals Fails To Give Full Effect To Haring v. Prosise And Migra v. Warren City School District Board of Education.

The court of appeals recognized that Haring, 103 S.Ct. 2368, required that the collateral estoppel law of the State of Wisconsin be used to determine the collateral estoppel effect in this §1983 action of the state court ruling (Pet. App. A28). Even though the district court had not done so, the court of appeals purported to apply the Wisconsin collateral estoppel standard (Pet. App. A28). The court, however, merely applied Wisconsin's verbal "test" but did not consider the body of Wisconsin law.

In Haring, the Court held that Vir-

ginia collateral estoppel law must determine whether Prosise's guilty plea would bar his §1983 action challenging an unlawful search. 103 S.Ct. at 2373. The Court noted the general rule in Virginia. Id. at 2374. Then, however, the Court went on to consider in depth the Virginia decisions in the collateral estoppel area and their possible application to the claim before the court.

In keeping with Haring, in Migra, the Court considered the effect of Ohio collateral estoppel law. 104 S.Ct. at 898-99. After surveying the development of Ohio collateral estoppel law, the Court concluded that Ohio would employ a broad doctrine of preclusion. Id. at 899. The Court, however, remanded the case to the district court because "[p]rudence . . . dictate[d]" that the

district court should first interpret Ohio collateral estoppel law. Id. at 899.

The court of appeals in the instant case did not consider and apply Wisconsin decisional law, as in Haring, and did not remand the case to the district court for such application, as in Migra. The court gave an inaccurate statement of Wisconsin law[5] and ignored Wisconsin decisional

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[5]The court of appeals stated that Wisconsin collateral estoppel doctrine bars relitigation of an issue that was "litigated, determined, and necessary to the decision in the prior proceeding." Reckner v. Reckner, 105 Wis. 2d 425, 436, 314 N.W.2d 159, 165 (App. 1981) (Pet. App. A28). More accurately, the Supreme Court of Wisconsin has held that collateral estoppel applies "where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged... ." State ex rel. Flowers v. Department of Health & Social Services, 81 Wis. 2d 376, 387, 260 N.W.2d 727, 734 (1978) (emphasis in original), quoting Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948); State v. Spanbauer, 108 Wis. 2d 548, 551, 322 N.W.2d 511, 512 (App. 1982).

law. The court of appeals failed to consider the fact that Wisconsin law does not permit offensive use of collateral estoppel where the parties are not the same and not in privity. Lindsay v. Cutter Laboratories, Inc., 536 F. Supp. 799, 800-801 (W.D. Wis. 1982).

The Court has emphasized that, standing alone, a challenge to state-law determinations will rarely constitute an appropriate subject of review by this Court. Haring v. Prosise, 103 S.Ct. at 2373 n.8. In the instant case, petitioner's claim is not that the court of appeals misread Wisconsin law, but that it failed to read it at all. Both Haring and Migra require a bona fide application of state law. That has not occurred in this case.

In order to define for the courts of

appeals a scope of the application of state collateral estoppel law required by Haring and Migra, this Court should consider this case on writ of certiorari.

CONCLUSION

Actions under §1983 against police officers to recover damages for Fourth Amendment violations will very frequently be brought when there has been a prior court determination of probable cause to arrest; often such suits are brought after probable cause has been found and there has been an acquittal.

If the Court declines to consider the instant case, a conflict over the collateral estoppel effect of a prior probable cause determination will remain among the courts of appeal. Moreover, the court of appeals' erroneous view of

the scope of a probable cause determination and its collateral estoppel effect will go unchecked. Finally, unless the court of appeals' failure to apply state collateral estoppel law is reviewed, the imperative of Haring and Migra will be permitted to evaporate.

Petitioner respectfully asks this Court to grant review.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID K. GUENTHER,

Plaintiff

v.

MEMORANDUM AND ORDER

MARK HOLMGREEN and CITY OF BLACK RIVER FALLS,

83-C-289-S

Defendants.

Before the Court are summary judgment motions by each defendant. In this suit brought pursuant to 42 U.S.C. §1983, plaintiff seeks to recover damages for what amounts to false arrest and imprisonment, claiming that he was arrested without probable cause, imprisoned overnight, and forced to stand trial on charges for which he was acquitted.

Defendants ask for summary judgment on the grounds that, first, plaintiff is estopped from claiming he was falsely arrested by operation of the state court's

probable cause determination; and second, plaintiff was not deprived of liberty without due process of law by virtue of his overnight incarceration nor by having to stand trial on the charges.

FACTS

Plaintiff David K. Guenther is an adult resident of Black River Falls, Jackson County, Wisconsin.

Defendant Mark Holmgreen is a resident of Black River Falls and, for the time pertinent to the complaint, was employed as a police officer for the City of Black River Falls.

Defendant City of Black River Falls is a municipal corporation with its principal place of business at the City Hall of Black River Falls.

Defendant Holmgreen arrested David Guenther shortly after midnight on July

25, 1982, and transported him to the Jackson County Jail for a period of time. Guenther's wife asked Holmgreen what amount of bail would be required and was told that bail in the amount of $400 would be required. When she offered to post $400 in bail, Holmgreen refused to accept it. Plaintiff was thereafter transferred to the Wood County Jail. Bail was accepted at 9:00 A.M. on July 25, 1982, and Guenther's wife picked up the plaintiff at Wood County Jail at about 9:45 A.M. that day.[1]

By his attorney, plaintiff Guenther

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[1]It is defendants' contention that Holmgreen transferred custody of the plaintiff to Jackson County officials after the arrest and, apparently, never again exercised control over plaintiff. Plaintiff Guenther's objections to these facts suggest that, at least, Holmgreen appeared to be in a position to exercise discretion with regard to continued custody and the Court accepts plaintiff's contentions as true for purposes of this motion.

moved the Court in the state court proceeding of State of Wisconsin v. David Guenther to dismiss the charges against him on the ground of no probable cause for arrest. After a hearing on September 1, 1982, the trial court, the Honorable Louis Drecktrah presiding, denied the motion.

After trial in the case of State of Wisconsin v. David Guenther, David Guenther was found not guilty of a state charge of disorderly conduct and the jury was unable to reach a verdict on the state charge of resisting arrest. Presumably, the resisting arrest charge was subsequently disposed of in favor of Guenther.

According to plaintiff's complaint, the circumstances of plaintiff's arrest are as follows: On the night of July 24-25, 1982, plaintiff was attending Rick's Summerfest on the grounds of the

Jackson County Fairgrounds. Shortly after midnight, plaintiff was conducting himself peacefully when he was struck in the mouth by another person attending the festivities, one Mark Oppelt. Plaintiff was immediately arrested, physically restrained, taken to the squad car in handcuffs and, thereafter jailed. Plaintiff claims that he was not advised of his right to counsel, was not allowed to contact his attorney by phone, and was not informed of his privilege against self-incrimination. Defendant City of Black River Falls is named as a defendant for its failure to properly train and supervise defendant Holmgreen.

MEMORANDUM

To the extent that Guenther claims he was deprived of liberty without due process, it is clear that the holding of the

Supreme Court in Parratt v. Taylor, 451 U.S. 527 (1982), is dispositive of the claim.

In Parratt, the Court held that the existence of state procedures which would make the plaintiff whole for a negligent deprivation of property were sufficient due process to negate the plaintiff's claim that the deprivation was without due process. In other words, a deprivation is not without due process as long as the process that is due is available.

Although there was some doubt subsequent to Parratt that the doctrine should be applied to intentional deprivations or deprivations of property as opposed to liberty, the recent case in this circuit of State Bank of St. Charles v. Camic, 712 F.2d 1140 (1983), disposes of this contention also. See also Barnier v. Szent-

miklosi, 565 F. Supp. 869 (E.D. Mich. 1983). Therefore, plaintiff cannot successfully assert that Holmgreen exercised some authority over plaintiff's custody after arrest.

There is a state tort remedy for the matters which form the basis of plaintiff's complaint. False arrest, false imprisonment and malicious prosecution are actionable in Wisconsin. Strong v. Milwaukee, 157 N.W.2d 619 (1968).

The Court notes, incidently, that, although plaintiff's factual assertions are taken as true for purposes of this motion, the support for plaintiff's position is woefully lacking. It appears that custodial decisionmaking passed to county personnel upon plaintiff's delivery into county custody after arrest.

Plaintiff's complaint also raises

issues concerning violations of plaintiff's Fifth and Sixth Amendment rights. Camic, above, is dispositive of plaintiff's claim that he was denied the right to contact an attorney by phone after his arrest. The right to counsel does not attach until the initiation of adversarial proceedings. 712 F.2d at 1144. Neither plaintiff's complaint nor his summary judgment filings raise any facts which would support a claim for a violation of the right to counsel within the meaning of Kirby v. Illinois, 406 U.S. 682 (1972).

The complaint also alleges that plaintiff was not informed of his right to counsel nor of his right not to incriminate himself. It is clear that an accused does not have a constitutional right to Miranda warnings. Rather, the Supreme Court decided in Miranda v. Arizona, 384

U.S. 436 (1966) that evidence obtained without a criminal defendant being informed of his Fifth and Sixth Amendment rights must be excluded. The warnings required under Miranda have no constitutional significance of their own. Thornton v. Buchmann, 392 F.2d 870, 874 (7th Cir. 1968); O'Hagan v. Soto, 523 F. Supp. 625, 629 (S.D.N.Y. 1981).

The Court is mindful of the admonition in Baker v. McCollan, 443 U.S. 137, 145 (1979) that:

> The Constitution does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted--indeed for every suspect released.

In Baker, the Court disposed of each of that plaintiff's post-arrest claims in a fashion similar to that employed above. However, it was presumed throughout that McCollan's arrest was, at the outset, law-

ful. That presumption is not available in this lawsuit because plaintiff Guenther asserts that there was no probable cause for his arrest. The fact that he was afforded a hearing regarding the existence of probable cause does not dispose of plaintiff's claim under the Parratt doctrine because the right assertedly violated was not one of procedural due process but was substantively protected by the Fourth Amendment. Presumably, someone who prevailed at a probable cause hearing might have a cause of action under §1983 for injuries suffered directly as a consequence of his arrest.

Recognizing this, defendants argue that plaintiff is collaterally estopped from litigating the issue of probable cause because the issue was decided against him at his preliminary hearing.

See Allen v. McCurry, 449 U.S. 90 (1980) (convicted felon collaterally estopped from litigating §1983 claim based on Fourth Amendment search and seizure claim by prior determination against him at a suppression hearing).

Plaintiff counters that Allen is not dispositive of the issue. In Whitely v. Seibel, 676 F.2d 245 (7th Cir. 1982), the Court held that, even after Allen, the traditional criteria of collateral estoppel must still be applied:

> Whether the issue sought to be concluded is the same as that involved in the prior action; was litigated in the prior action; was in fact judicially determined in the prior action; and whether the judgment in the prior action was dependent upon the determination made of the issue.

Whitely at 248. Coincidentally, the issue which was the subject of the inquiry in Whitely was a probable cause determination made in a state court criminal proceed-

ing. The Court concluded that Whitely was not collaterally estopped from litigating the issue in his §1983 action.

The facts in Whitely were determinative. The Court held that there was a lack of identity of issues because the §1983 suit "attacked the integrity, rather than the sufficiency, of the evidence." Id. at 249. Significantly, the Court in Whitely stated:

> Although we concede that there will be identical issues in a preliminary hearing and a Section 1983 suit when only the legality of the arrest is at issue, we do not find that proposition applicable to this case.

Id. The proposition is applicable to this case.

Plaintiff tries to frame the facts of this case with the facts of Whitely. He does not succeed. A review of the transcript of the probable cause hearing discloses that plaintiff contested both the

sufficiency and integrity of the evidence against him. He tried to show that the evidence on which the arresting officer relied was pretext--in effect, that the events which formed the asserted basis for the arrest actually occurred after the arrest had taken place. Guenther thoroughly litigated the integrity of the officers who were prosecution witnesses, including defendant Holmgreen.

The third and fourth prongs were not met in Whitely because the Court felt that the "issue" which was sought to be precluded, the alibi defense, was neither judicially determined nor was the Court's determination dependent upon it. In this case, on the other hand, the "issue" was the entire matter of probable cause. The issue was joined, at the behest of party sought to be precluded here, and was judi-

cially determined. After considerable testimony presented by both sides, and after what appears to be rigorous cross examination by Guenther's attorney, the Court determined that probable cause existed.

Plaintiff's main resistance to the contention that probable cause had been determined is based on the fact that the criminal trial jury was separately instructed concerning probable cause. This factor is of no help to Guenther. One of the charges against him was resisting arrest. One of the elements of that crime is that the officer executing the arrest was acting within his lawful authority. That in turn is dependent on whether probable cause existed. See Wisconsin Jury Instruction - Criminal, #1765. It is elementary that the burden on the prosecution

is to prove each element of the offense beyond a reasonable doubt. The trial court was required to submit the issue to the jury regardless of its prior determination.

There remains only one prong of the collateral estoppel test--whether the matter was, in fact, fully and fairly litigated. In Whitely, the Court held that the issue had not actually been litigated because the real issue in the §1983 action was whether the officer knew or should have known that Whitely had an alibi. The alibi question was not litigated because, for tactical reasons, Whitely chose not to raise the issue within the context of a preliminary hearing, and he was not required to do so. In this case, plaintiff Guenther doesn't raise an issue which was not litigated, must less, as

Whitely did, provide a reason why a matter which could have been litigated was not. The hearing was held at the behest of the criminal defendant (plaintiff here) apparently because he felt that this prosecution was groundless and that he could make a showing in this regard. There was, therefore, every reason for the plaintiff to fully litigate the issue of probable cause at the hearing, and there is no indication that it was not.

Thus, the first, third and fourth prongs of the test are clearly met here. As for the second, whether the issue was actually litigated, it appears that this prong has also been met as far as the parties have discussed the issue. One matter not raised by the parties gives the Court pause, however.

According to the Restatement of Judg-

ments 2nd, §28, relitigation of an issue which otherwise would be precluded by a prior determination is not precluded when:

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...

The comments to the restatement go on to say that:

> The availability of review for the correction of errors has become critical to the application of preclusion doctrine. If review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of §27 (general preclusion doctrine) is inapplicable by its own terms.

Id., comment (a).

As a general matter, a probable cause determination against the criminal defendant is not appealable as a matter of right and is doubtless moot after the criminal proceeding concludes in favor of the criminal defendant. Wis. Stats., 808.03(1). However, under Wis. Stats. §808.03(2), the

State provides a procedure for interlocutory appeals which could have been utilized here. See also Wis. Stats. 809.50. Neither the Restatement, nor any case law of which the Court is aware, requires that reviewability of the determination which is sought to be utilized for preclusion must be a matter of right. It would appear that the purpose served by collateral estoppel doctrine - avoidance of relitigation of issues already decided - is served by holding that the requirement of availability of review to correct error is met by the interlocutory appeal procedure in the Wisconsin Statutes.

The purpose is also served by applying collateral estoppel in this case as well. Although this Court, under the procedural posture of this case, is not sitting in review of the trial court's deter-

mination, it is clear that the trial court's determination was correct. The standard of review of such determinations under Wisconsin law is not rigorous and amounts to, practically, a review as to whether there is any evidence to support the factual determination. State v. Berby, 260 N.W.2d 798, 802 (Wis. 1978):

> Regardless of who prevails at the preliminary hearing we will only review the record enough to determine whether:
>
> . . .there is competent evidence for the judicial mind of the examining magistrate to act on in determining the existence of the essential facts, . . .

(emphasis supplied). As is apparent from the underlined language above, the Wisconsin Supreme Court contemplates review of the probable cause determination. If the determination in this case had been reviewed, it would have withstood this level of scrutiny.

Further support for the Court's view is evident by implication from Whitely itself. Whitely was in essentially the same position as this plaintiff--allegedly wronged by a probable cause determination but prevailing on the criminal charge. In other words, he did not have the opportunity to appeal as a matter of right. The Court of Appeals exhaustively considered the collateral estoppel criteria, one at a time, without ever mentioning the reviewability issue which would have disposed of the question without further inquiry. The Court concludes that appellate review as a matter of right is not necessary in order to invoke collateral estoppel.

Accordingly, the Court holds that the probable cause determination in plaintiff's criminal case precludes the relitigation of this issue in this Court. All

other possible causes of action in plaintiff's complaint having been disposed of,

ORDER

IT IS ORDERED that the motions of defendant Holmgreen and City of Black River Falls are GRANTED. Judgment shall be entered in favor of the defendants with prejudice and costs.

Entered this 25th day of October, 1983.

BY THE COURT:

/s/
JOHN C. SHABAZ
District Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-3136

DAVID K. GUENTHER,

Plaintiff-Appellant,

v.

MARK HOLMGREEN and
CITY OF BLACK RIVER FALLS,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin.
John C. Shabaz, *Judge.*

ARGUED APRIL 5, 1984—DECIDED JULY 9, 1984

Before POSNER and COFFEY, *Circuit Judges*, and GIBSON, *Senior Circuit Judge.**

GIBSON, *Senior Circuit Judge.* Plaintiff, David K. Guenther, a resident of Black River Falls, brought this § 1983 damage action claiming his arrest by defendant Mark Holmgreen, a police officer for the defendant city of Black River Falls, was made without probable cause, resulting in his detention in deprivation of his substantive Fourth Amendment rights and his due process rights

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* The Honorable Floyd R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, is sitting by designation.

under the Fourteenth Amendment. The district court, 573 F. Supp. 599, granted defendant's motion for summary judgment, concluding: (1) under *Parratt v. Taylor*, 451 U.S. 527 (1981), Guenther was not deprived of his liberty without due process of law because post-deprivation state tort remedies were available (viz., actions for false arrest, false imprisonment, and malicious prosecution); (2) Guenther was collaterally estopped from litigating the Fourth Amendment probable cause issue because that issue was decided against him at his preliminary hearing. Guenther claims these two conclusions were erroneous. We affirm.

I.

On July 25, 1982, shortly after midnight, Holmgreen arrested Guenther at a public festival held on the Jackson County Fairgrounds in Black River Falls. In his complaint, Guenther alleged that, just prior to the arrest, he was peaceably minding his own affairs when a fellow festival participant struck him in the mouth. Allegedly, Holmgreen then immediately arrested Guenther, handcuffed him and transported him to the Jackson County Jail, where he was charged with disorderly conduct and resisting arrest, both misdemeanors. Bail was initially set at $400.00, but Holmgreen allegedly refused to accept Guenther's wife's offer to post that amount. Guenther was later transferred to the Wood County Jail, where bail was accepted at 9:00 A.M. on July 25, 1982. Guenther then left the Wood County jail.

Guenther's attorney moved the state trial court to dismiss the misdemeanor criminal charges against him, claiming a lack of probable cause to arrest. The state trial court held an evidentiary hearing on the probable cause issue, during which Guenther attempted to show that Holmgreen falsified the factual basis for the arrest by relying on events that actually occurred after the arrest. To do this, Guenther's counsel rigorously cross-examined Holmgreen and other state witnesses to the incident, and

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called a witness to contradict the state's version of the incident. Following this hearing, the trial court determined that there was probable cause to arrest and denied Guenther's motion to dismiss.

After his criminal trial, Guenther was found not guilty of the charge of disorderly conduct; the jury was unable to reach a verdict on the resisting arrest charge. Presumably, the resisting arrest charge was subsequently disposed of in favor of Guenther.

Thereafter, Guenther brought this § 1983 "constitutional tort" action against Holmgreen and the City of Black River Falls. In the district court and on this appeal, Guenther has claimed that the arrest, allegedly made without probable cause and based upon Holmgreen's factual misrepresentations, violated his Fourteenth Amendment right to be secure against unreasonable searches and seizures. Guenther has also claimed he was deprived of liberty without due process of law under the Fourteenth Amendment. Guenther has named the City of Black River Falls as a defendant for its alleged failure to properly train and supervise defendant Holmgreen. On this appeal, Guenther principally challenges the district court's conclusion that he was not denied liberty without due process and that he was collaterally estopped from relitigating the Fourth Amendment probable cause issue, which was determined against him in the state court's preliminary hearing.[1]

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[1] In the district court, Guenther also claimed his Fifth and Sixth Amendment rights were violated because he was denied the right to contact an attorney by phone after his arrest. The district court rejected this claim, holding that Guenther's right to counsel did not attach until the initiation of adversarial proceedings. *Guenther v. Holmgreen*, 573 F. Supp. at 599, 600 *citing Bank of St. Charles v. Carmic*, 712 F.2d 1140, 1144 (7th Cir. 1983). Guenther apparently does not challenge this manifestly correct holding. Nor does Guenther challenge the district court's rejection of his damage claim based upon the alleged failure to advise him of his *Miranda* warnings. *Id.*

II.

First, *Parratt v. Taylor*, 451 U.S. 527 (1981), does not entirely dispose of Guenther's § 1983 claim. In *Parratt*, 451 U.S. at 543-44, the Supreme Court held that the negligent loss of property by state officials did not present a cognizable § 1983 due process claim when state tort remedies provided adequate relief for the deprivation. The Seventh Circuit has applied *Parratt* to deprivations of life, liberty, as well as property. *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 871 (7th Cir. 1983); *State Bank of St. Charles v. Carmic*, 712 F.2d 1140, 1147 (7th Cir. 1983). The rationale behind *Parratt* is that a victim of a property or liberty deprivation who has recourse to an adequate state remedy has not been denied "due process of law". *Id.*; *see also* M. Wells and J. Eaton, *"Substantive Due Process and The Scope of Constitutional Torts"* 18 Georgia L. Rev. 201, 211-12 (1984). Hence, as the court stated in *Wolf-Lillie*, 699 F.2d at 871, "[T]he *Parratt* decision . . . requires federal courts to consider the adequacy and availability of remedies under state law before concluding that a deprivation of life, liberty, or property violates due process of law", citing *Ellis v. Hamilton*, 669 F.2d 510, 515 (7th Cir. 1982).

As the district court properly recognized, there are Wisconsin tort remedies for matters which form the basis of Guenther's claim that he was deprived of liberty without due process of law. Specifically, claims for false arrest, false imprisonment, and malicious prosecution are all actionable in Wisconsin. *Strong v. City of Milwaukee*, 38 Wis. 2d 564, 157 N.W.2d 619, 621-22 (1968); *Elmer v. Chicago and Northwestern Railroad Co.*, 257 Wis. 228, 43 N.W.2d 244 (1950). Presumably, the recovery of consequential damages for these torts would permit compensation for injuries to Guenther's reputation. *See Gladfelter v. Doemel*, 2 Wis.2d 635, 87 N.W.2d 490, 497 (Wis. 1958). Because of the availability of these state tort remedies, it could be said that Wisconsin has done all that the Fourteenth Amendment requires in this context to guarantee Guenther procedural due process. *Cf., Carmic*, 712 F.2d at 1144: *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

However, Guenther has not merely stated a procedural due process claim; he also has claimed that the arrest, allegedly made without probable cause and based upon Holmgreen's misrepresentation, violated his substantive Fourth Amendment right to be free from unreasonable searches and seizures. Two separate Seventh Circuit panels and various other courts and commentators have recognized that *Parratt* is inapplicable where the plaintiff asserts a violation of substantive constitutional guarantees—e.g., Fourth Amendment protections—as distinguished from a violation of his procedural due process rights. *Wolf-Lillie*, 699 F.2d at 871-72; *Carmic*, 712 F.2d at 1147 n. 5; *Duncan v. Poythress*, 657 F.2d 691, 704 (5th Cir. 1981); M. Wells & T. Eaton, "*Constitutional Torts*" 18 Georgia L. Rev. at 202, 211-12. Thus far, the Supreme Court has not retrenched from its seminal holding in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), that a substantive Fourth Amendment violation gives rise to a cognizable § 1983 action regardless of the existence of state tort remedies. *See Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982) (reaffirming *Monroe v. Pape*).

Baker v. McCollen, 443 U.S. 137 (1979) is illustrative of the distinction the court has drawn between a general Fourteenth Amendment due process right claim and a substantive Fourth Amendment claim, as alleged in *Monroe v. Pape* and here. In *Baker*, the plaintiff was mistakenly named in a valid arrest warrant and, as a result, spent three days in jail until it was discovered that he was not the person whom authorities had intended to arrest. In denying plaintiff's § 1983 "false imprisonment" claim, the Court stated:

> Absent an attack of the validity of the warrant under which he was arrested, [plaintiff's] complaint is simply that despite his protests of mistaken identity, he was detained in [jail for three days] when the validity of his protests was ascertained. Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution. [Plaintiff] was indeed deprived

> of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment.
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> . . .
>
> [Plaintiff's] innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all jurisdictions, is largely irrelevant to his claim of deprivation without due process of law. [ ] The Constitution does not guarantee that only the guilty will be arrested. If it did § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released.

Id. at 143-45.

In this case, unlike *Baker*, the plaintiff asserts that his arrest was made in bad faith and without probable cause, thereby depriving him of his right to be free from unreasonable seizures as guaranteed by the Fourth Amendment. Accepting these allegations as true, the plaintiff Guenther might have a cognizable § 1983 cause of action for injuries suffered as a result of the illegal, unconstitutional arrest. *See Whitley v. Seibel*, 613 F.2d 682, 685-86 (7th Cir. 1980); *Davis v. Murphy*, 559 F.2d 1098, 1100, 1102 (7th Cir. 1977); *Joseph v. Rowlen*, 402 F.2d 367, 370 (7th Cir. 1968); *Landrigan v. City of Warwick*, 628 F.2d 736, 743 (1st Cir. 1980); *Harper v. McDonald*, 679 F.2d 955, 959-60 (D.C. Cir. 1982).

Recognizing this, defendants have argued and the district court concluded that Guenther was collaterally estopped from litigating the issue of probable cause because that issue was decided against him at his preliminary hearing. Under collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). However, collateral estoppel applies only when the party against whom the earlier deci-

sion is being asserted had a "full and fair opportunity" to litigate the issue in question. *Id.*; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481 n.22 (1982). In *Allen v. McCurry*, 449 U.S. 90, 104-05 (1980) the Supreme Court held that collateral estoppel can be invoked against a § 1983 claimant to bar relitigation of his Fourth Amendment search and seizure claim decided against him in a state criminal suppression hearing. *See also Haring v. Prosise*, ... U.S. ....., 103 S.Ct. 2368, 2372-73 (1983).[2]

In *Whitley v. Seibel*, 676 F.2d 245, 248 (7th Cir. 1982), the court, following *Allen*, recognized that the application of the collateral estoppel doctrine to § 1983 claims turns on whether the "traditional" four collateral estoppel requirements have been met: i.e., the issue sought to be precluded must be the same as that involved in the prior judicial proceeding; the issue was litigated in the prior action; the issue was in fact actually determined in the prior proceeding; and the determination of that issue was necessary to support the judgment in the prior proceeding. In *Haring v. Prosise*, 103 S. Ct. at 2373-74, the Court indicated that federal courts should apply the state's collateral estoppel law in determining whether a § 1983 claim is precluded by a prior state judicial proceeding. Wisconsin courts have recognized that the collateral estoppel doctrine bars relitigation of an issue that was "litigated, determined, and necessary to the decision in the prior proceeding." *Reckner v. Reckner*, 105 Wis.2d 425, 314 N.W.2d 159, 165 (Wis. App. 1981) *citing State ex rel Flowers v. DH & SS*, 81 Wis.2d 376, 260 N.W.2d 727, 734 (Wis. 1978). The Wisconsin standard is therefore substantially similar to the "traditional" standard set forth in *Whitley* and applied by the district court here. In *Har-*

[2] In *Haring v. Prosise*, the Court, applying Virginia's collateral estoppel law, held that a § 1983 plaintiff's prior guilty plea in a state criminal proceeding did not estop him from bringing an action based upon a warrantless search, since the legality of the search was not actually litigated and necessarily determined in the state proceeding.

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ing v. Prosise, 103 S. Ct. at 2375, the Court also stated "[a]s a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, [r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigations." *Quoting Montana v. United States*, 440 U.S. 147, 164 n.11 (1979); *see also Allen v. McCurry*, 449 U.S. at 95.

Applying the above principles, we believe the district court correctly determined that Guenther's probable cause claim was precluded by the state court's determination of that claim in the state criminal preliminary hearing. Guenther's § 1983 complaint essentially attacked the legality of the arrest, alleging that the arrest was made without probable cause and based upon Holmgreen's misrepresentations to prosecution authorities. At Guenther's behest, these claims, attacking both the sufficiency and integrity of the evidence supporting probable cause, were raised and actually litigated in the preliminary hearing.[3] At the hearing, Guenther's counsel attacked the legality of the arrest by attempting to show that the events Holmgreen relied on to establish probable cause actually occurred after the arrest had taken place. Guenther thoroughly litigated and challenged the veracity of Holmgreen and the other prosecution witnesses who supplied the bases for probable cause. Specifically, Guenther's counsel rigorously cross-examined Holmgreen regarding his version of the events leading up to arrest and called a witness to rebut Holmgreen's version. The court heard considerable testimony from both sides before making its probable cause determination. There can be little doubt that the issue of Holmgreen's veracity and good faith—

[3] In Wisconsin, a preliminary probable cause hearing is statutorily required, when requested, for felony charges. Wis. Stat. § 970.02 (1)(c); *State v. Hooper*, 305 N.W.2d 110, 118 (Wis. 1981). Guenther received a probable cause hearing after his attorney moved to dismiss the misdemeanor charges for a lack of probable cause.

the linchpin of Guenther's § 1983 Fourth Amendment claim—was both raised and actually litigated in the preliminary hearing.

Moreover, the state court's determination that there was probable cause to arrest Guenther "actually" and "necessarily" entailed the rejection of Guenther's challenges to Holmgreen's veracity, integrity, and good faith. In *Franks v. Delaware*, 438 U.S. 154, 164-65, 171 (1977), the Supreme Court held that a defendant contesting probable cause for an issued and executed warrant may challenge the veracity and integrity of the warrant affidavit. The court explained that where such challenges are made, the finding of probable cause necessarily requires an evaluation of the truthfulness as well as the sufficiency of the affiant's allegations in support of probable cause. The Court stated, "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause', the obvious assumption is that there will be a *truthful* showing." *Quoting United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D. N.Y. 1966). The Court in *Allen v. McCurry*, 449 U.S. at 102 n.18, apparently recognizing this basic assumption, noted that a "state court decision that the police acted legally [i.e., with probable cause] cannot but foreclose a [§ 1983] claim that they acted in bad faith."[4] In view of *Franks* and *Allen*, the trial court's finding of probable cause to arrest Guenther, having been made only after Guenther had fully challenged Holmgreen's veracity and good faith, necessarily depended on the trial court's determination that Holmgreen had truthfully stated the factual bases for probable cause.

This case is therefore readily distinguishable from *Whitley v. Seibel*, 676 F.2d 245 (7th Cir. 1982), where the

[4] In *Whitley v. Seibel*, 676 F.2d at 248, the court interpreted *Allen* to mean that: "if a Section 1983 plaintiff must show both that an arrest was illegal and that the arresting officer had no reasonable, good faith belief in its legality, the determination that an arrest is supported by probable cause (and therefore legal) logically undercuts the Section 1983 claim."

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court held that a probable cause finding made in a summary and cursory criminal preliminary hearing did not estop the defendant from later bringing a § 1983 claim challenging the "integrity, rather than the sufficiency of the evidence" supporting probable cause. Whitley's § 1983 claim alleged that the arresting officer had failed to investigate Whitley's alibi and had misrepresented to prosecuting authorities that he had checked the alibi and found it to be false. However, Whitley's preliminary hearing, unlike Guenther's, was a "summary proceeding", only addressing the sufficiency, not the integrity of the evidence supporting probable cause. Further, Whitley, unlike Guenther, was unable to discover what was in the prosecutor's arsenal or to appeal the probable cause finding.[5] Finally, and most significantly, unlike Guenther, Whitley, presumably for tactical reasons, never raised or litigated the issue of the arresting officer's veracity during the preliminary hearing; nor did Whitley raise or litigate the issue of his purported alibi witness.

We also conclude that Guenther was given a "full and fair opportunity to litigate" his probable cause challenges in the preliminary hearing. The Supreme Court has recently indicated that to satisfy the "full and fair opportunity to litigate" requirement, the prior state proceedings "need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process clause". *Kremer v. Chemical Corp.*, 456 U.S. 461, 481 (1982); *see also Prosise*, 103 S. Ct. 2375; C. Wright, A. Miller & E. Cooper 18 *Federal Practice & Procedure* § 4471 at 707-08 (1981); *id.* at 101-03 (Suppl. 1984). And "no single model of procedural fairness, let alone a particular form of procedure is dictated by the Due Process Clause . . . . 'The very nature of due process negates any concept of inflexible procedures universally applicable to

[5] As the district court in this case recognized. Guenther could have sought an interlocutory appeal of the trial court's probable cause determination. *See State v. Berby*, 81 Wis.2d 677, 260 N.W.2d 798, 802 (1978).

every imaginable situation." *Kremer*, 456 U.S. at 483 (citations omitted).

Admittedly, in Wisconsin, a preliminary hearing is typically a summary proceeding designed merely to determine whether there is sufficient evidence to establish a reasonable probability that defendant has committed a crime. *See State v. Hooper*, 101 Wis.2d 517, 305 N.W.2d 110, 121, 123-24 (Wis 1981). And, a Fourth Amendment judicial determination of probable cause need not be accompanied by the full panoply of adversarial-type safeguards—e.g., counsel, confrontation, and cross-examination of witnesses. *Gerstein v. Pugh*, 420 U.S. 103, 119-21 (1975). However, Guenther requested and received a much more extensive and probing hearing than required by Wisconsin law or the Fourth Amendment. As mentioned above, Guenther's counsel was permitted to cross-examine Holmgreen and the other state witnesses, and to present his own rebuttal witness in an attempt to impeach the integrity of the evidence supporting probable cause. The hearing Guenther was given compared favorably, in nature and scope, with the full adversarial-type evidentiary hearings countenanced in *Franks v. Delaware*, 438 U.S. 154 (1977) and *Coleman v. Alabama*, 399 U.S. 1 (1970). *See Searing v. Hayes*, 684 F.2d 694, 695 (10th Cir. 1982) (full and fair opportunity to litigate legality of search met even though plaintiff was denied *Franks*-type evidentiary hearing on the question of the truthfulness of the affiants).

Guenther, however, contends that in order to fully and fairly litigate Holmgreen's veracity, he would have been required to testify at the hearing and directly challenge Holmgreen's version of the events. According to Guenther, he did not testify for fear that he might provide incriminating testimony that could be used against him at trial. He asserts that it would be fundamentally unfair to require him to choose between the meaningful exercise of his Fifth Amendment right against compelled self-incrimination and the full and fair litigation of his § 1983 Fourth Amendment claims. Although there is no case law directly on point, both parties assume that, under

Wisconsin law, the defendant's preliminary hearing testimony could be used against him at trial.[6]

Guenther's argument essentially attempts to raise the concerns that led the Court in *Simmons v. United States*, 390 U.S. 377 (1968), to hold that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Id.* at 394. In *Simmons*, the defendant, in order to assert Fourth Amendment standing to suppress seized evidence, was required to provide testimony that necessarily incriminated him in the possessory crime charged. The defendant's need to choose between waiving the Fifth Amendment privilege and asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the Fourth Amendment claim of exclusion, created a situation the Court resolved by reasoning "we find it intolerable that one constitutional right should have to be surrendered in order to assert another". *Simmons*, 390 U.S. at 394. *See also United States v. Kahan*, 415 U.S. 239, 242 (1974); *McGautha v. California*, 402 U.S. 183, 211-12 (1971).[7] The *Simmons* rule was thus essentially

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[6] In *Neely v. State*, 292 N.W.2d 859, 867 (Wis. 1980), the Wisconsin Supreme Court dealt with the possible use of a defendant's criminal trial testimony in his subsequent but related criminal trial. The Court held, "[e]xcept where the defendant is impelled to testify in order to meet evidence introduced against him in violation of his constitutional rights, the general rule is that a defendant's testimony at another trial is admissible against him in a later proceeding". *Citing Harrison v. United States*, 392 U.S. 219, 222-26 (1968).

[7] The Supreme Court has not decided whether *Simmons* precludes the use of a defendant's suppression hearing testimony to impeach his trial testimony. *See United States v. Salvucci*, 448 U.S. 83, 93-94 (1980). However, a number of state and federal courts have held that a defendant's suppression hearing testimony, though inadmissible to prove guilt, may be admissible for impeachment of defendant's trial testimony. *See id.* at 448 U.S. at 93, n.8.

(Footnote continued on following page)

hinged on the important policies underlying the Fifth and Fourth Amendments: a criminal defendant should not be forced to give up his privilege against compelled self-incrimination in order to pursue a Fourth Amendment right to be free from unreasonable searches and seizures. However, as the Supreme Court has also recognized, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights' ". *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980); *see also McGautha v. California*, 402 U.S. at 213. ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token, always forbid requiring him to choose.")

In litigating his claims at the preliminary hearing, Guenther was clearly not faced with the harsh dilemma the defendant faced in *Simmons*. First, Guenther's possible testimony at the preliminary hearing would have been essentially exculpatory, rather than necessarily incriminatory, with respect to the crimes charged. Presumably, Guenther would have provided testimony rebutting the state's testimony that there was sufficient grounds to arrest him. His choice to testify or not regarding the probable cause issue at the preliminary hearing was no harder than the choice a defendant typically faces when deciding whether to testify on his own behalf at

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[7] *continued*

See also, United States v. Gomez-Diaz, 712 F.2d 949, 951 (5th Cir. 1983).

Further, neither the United States Supreme Court nor the Wisconsin Supreme Court has decided how the *Simmons* rule of testimonial immunity may apply to pre-trial hearings other than a suppression hearing—such as an arraignment or a preliminary hearing. However in *Pederero v. Wainwright*, 590 F.2d 1383, 1388 n.3 (5th Cir. 1979), the Court, relying on *Simmons*, held that a defendant could have fully testified at his arraignment in support of his insanity or incompetence claim without fear that such testimony could be used at his state criminal trial.

trial.[8] We thus reject the notion that Guenther's decision to testify at the hearing would have compelled him to incriminate himself. Furthermore, considering the matter obversely, we do not believe that Guenther's failure to testify prevented him from asserting and pursuing his Fourth Amendment claims. At the hearing, Guenther not only rigorously cross-examined Holmgreen but also produced a witness who rebutted Holmgreen's version of the events. At most, Guenther's possible testimony would have served to corroborate his rebuttal witnesses' testimony.

Guenther also challenges application of collateral estoppel on the grounds that the standard for probable cause in a criminal proceeding is somehow different from or less stringent than the standard for probable cause in a § 1983 action. Guenther misapprehends the law. The probable cause standard in both the criminal proceeding and the constitutional tort case is the same—viz., whether the facts and circumstances were sufficient to warrant a reasonable per-

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[8] The choice facing Guenther does not appear to be harder than the choice facing the defendant in *McGautha v. California*, 402 U.S. 183, 210-217 (1971). In that case, the defendant, charged with murder, contended that his right to remain silent was burdened unconstitutionally because he could not testify for mitigation of punishment without risking incrimination on the question of guilt. The Court recognized that a defendant who takes the stand on his own behalf must testify fully and answer questions on cross-examinations that are reasonably related to the subject rather of his direct examination.

The Court held:

> It is not thought overly harsh in such situations to require that the determination to waive the privilege take into account the matters which may be brought out on cross-examination . . . .
>
> . . . .
>
> We conclude that the policies of the privilege against compelled self-incrimination are not offended when a defendant in a capital case yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.

Id. at 215, 217.

son in believing that the suspect had or was committing a crime. *See Banish v. Locks*, 414 F.2d 638, 641 (7th Cir. 1969); *Stelloh v. Liban*, 21 Wis.2d 119, 124 N.W.2d 101, 103-04 (Wis. 1963) (applying criminal probable cause standard in tort action for false arrest and imprisonment); *see also Pierson v. Ray*, 306 U.S. 547, 555 (1967); *Gerstein v. Pugh*, 420 U.S. at 111, 120-21. As the Court stated in *Pierson v. Ray*, 386 U.S. at 555, "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved . . . . A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Furthermore, to succeed in a § 1983 action based upon the Fourth Amendment, the plaintiff must prove not only that the arrest was illegal—i.e., without probable cause—but also that the arresting officer had no reasonable good faith belief in its legality. *Whitley v. Seibel I*, 613 F.2d at 685; *Whitley v. Seibel II*, 676 F.2d at 248; *Brubaker v. King*, 505 F.2d 534, 537 (1974) (§ 1983 standard of reasonableness imposed lesser burden on arresting officers than did the criminal standard of probable cause). Accordingly, as the Supreme Court noted in *Allen v. McCurry*, 449 U.S. 90, 102 n.18, a state court's finding that the arrest was legal—i.e., supported by probable cause—would foreclose a § 1983 claim that the arresting officer acted in bad faith. *See also Whitley v. Seibel II*, 676 F.2d at 248; *Smith v. Gonzalez*, 670 F.2d 522, 526 (5th Cir. 1982).

In a closely related argument, Guenther suggests that collateral estoppel should not apply because the state's burden of evidentiary proof in the criminal proceeding is less than the burden it must shoulder with respect to a § 1983 cause of action. It is, of course, well established that issue preclusion may be defeated by shifts in the burden of persuasion or by changes in the degree of persuasion required. *See* 18 C. Wright, A. Miller, & E. Cooper *Federal Practice and Procedure* § 4422 at 209 (1980). For example, the failure to carry a higher standard

of proof does not preclude a subsequent attempt to satisfy a lower standard. *Id.*; *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (government's failure to prove an issue beyond a reasonable doubt in a criminal prosecution does not preclude a subsequent attempt to prove the same issue by a preponderance of the evidence in a civil action). However, it is also well established that if one party has carried the burden of proving an issue in the first proceeding, a favorable determination on that issue is binding in later litigation in which the burden of proving the contrary would be on his adversary. *Id.*, *Federal Practice* at 213 n.7.

In the criminal proceeding here, the state assumed the initial burden of producing sufficient evidence to establish a reasonable probability that Guenther had committed a crime. *Lofton v. State*, 266 N.W.2d 576, 579 (Wis. 1978); *Wendricks v. State*, 242 N.W.2d 187, 191 (Wis. 1976) (state must show quantum of evidence which would lead a reasonable police officer to believe that defendant probably committed a crime). By finding the arrest was based upon probable cause and, thus, legal, the court determined that the state had satisfied this evidentiary burden. In this § 1983 action, the plaintiff, Guenther, has the burden of proving all the elements of his § 1983 Fourth Amendment claim by a preponderance of the evidence. *See* Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation* at 61 (1979); *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). Specifically, Guenther shoulders the burden of proving that the arrest was made without probable cause, thereby depriving him of rights secured by the Fourth Amendment. *See Whitley v. Seibel I*, 613 F.2d at 682; *Whitley v. Siebel II*, 676 F.2d at 248. (§ 1983 plaintiff assumes burden of showing that arrest was illegal—i.e., without probable cause—and that the arresting officer had no reasonable good faith belief in its legality). Thus, Guenther, now assuming a greater burden of proof than he had in the state criminal proceeding, can not avoid the preclusive effect of the state court's determination on grounds of different or shifting standards of evidentiary

proof. Our conclusion here is consistent with the Supreme Court's recognition in *Allen v. McCurry*, 449 U.S. at 102 n.18, that a state court's finding that the police acted legally—i.e., with probable cause—would foreclose a § 1983 claim that they had acted in bad faith. *See also Whitley v. Seibel II*, 676 F.2d at 248.

We conclude by noting that since Guenther invited a state criminal proceeding which permitted him to fully and fairly litigate both the sufficiency and the integrity of the evidence supporting probable cause, the policies underlying the collateral estoppel doctrine—judicial economy and consistency of judgments—would be frustrated if we were to permit him to relitigate those claims in federal court. In passing § 1983, "[Congress did not intend] to allow relitigation after a full and fair hearing simply because the state court's decision may have been erroneous." *Allen v. McCurry*, 449 U.S. at 101.

We should add that the state court's determination of probable cause estops Guenther from raising any Fourteenth Amendment due process claim based upon general tort theories of false arrest, false imprisonment, and malicious prosecution.[9] It is undisputed that, under Wisconsin law, an essential element of claims for false arrest, false imprisonment, and malicious prosecution is that arrest, imprisonment, or prosecution be undertaken without probable cause.[10] Thus, to the extent that Guenther's § 1983 general due process claim is predicated on allegations of false arrest, false imprisonment, or malicious prosecution, it would be precluded by the state court's determination of probable cause. *See Terket v. Lund*, 623 F.2d 29, 31 (7th Cir. 1980).

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[9] We mention this only because Guenther has tied his general Fourteenth Amendment claim (i.e., that he was deprived of liberty without due process) to his Fourth Amendment claim that the arrest was made without probable cause.

[10] *See Stelloh v. Liban*, 124 N.W.2d at 102-04; *Brownsell v. Klawitter*, 102 Wis.2d 108, 306 N.W.2d 41, 43 (Wis. 1981).

18 No. 83-3136

Judgment affirmed.

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SUPREME COURT OF THE UNITED STATES

No. A-255

DAVID A. GUENTHER,

Petitioner,

v.

MARK HOLMGREEN and CITY OF BLACK RIVER FALLS,

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 6, 1984.

/s/ John Paul Stevens
Associate Justice of the
Supreme Court of the United
States

Dated this 11th
day of October, 1984.

STATE OF WISCONSIN JACKSON COUNTY
CIRCUIT COURT

STATE OF WISCONSIN	)	
	)	
vs.	)	PROBABLE CAUSE
	)	HEARING
DAVID GUENTHER	)	

* * * * * * * * * * * * * * * * * *

S T E N O G R A P H I C R E C O R D

of the proceedings had in the above-entitled matter on September 1, 1982, at Black River Falls, Wisconsin, before the Honorable Louis I. Drecktrah, Jackson County Circuit Judge.

APPEARANCES:

The State appeared by Michael K. McQuillan, Assistant Jackson County District Attorney.

The Defendant appeared in person and by Robert J. Mubarak, Attorney at Law, Tomah, Wisconsin.

. . . .

THE COURT: Sure can. Then the court will close all testimony. We'll let you be first, Mr. Mubarak. What about your officers, would they want to come in? Have you got any people you would like to have watch the rest of the proceedings? We get criticized, Mr. Mubarak, when people don't get a chance to get in and hear everything that goes on. We'll hear from Mr. Mubarak first.

MR. MUBARAK: I think what the court has to determine here is, first of all, and first and most importantly, is was there a legal arrest for disorderly conduct, because everything that comes after that is all based upon this arrest for disorderly conduct. And in order for an individual to engage in disorderly conduct according to the statutes he must engage

in some type of conduct which under the circumstances tends to cause or provoke a disturbance. So what we have to determine here today is was Mr. Guenther's actions based upon Mr. Holmgreen's observations sufficient to lead to a charge of disorderly conduct. All the other incidents that occurred after that are what we call fruit of the poisoned tree, and they don't get in if this arrest was an illegal arrest.

THE COURT: I guess that's right, surely.

MR. MUBARAK: There is undisputed testimony that Mr. Guenther was standing there when Oppelt came up to him and smacked him in the face. The testimony of Officer Spangler was that Oppelt -- or that Guenther didn't do anything after he hit him in the face. Spangler had an

opportunity to restrain him, he didn't do it, no reason to. He went after Oppelt. Holmgreen came along, grabbed Guenther and led him outside.

Now it's our position that right at that point Mr. Guenther's liberties were restrained to such an extent that he was for all practical matters under arrest. He was not free to move about either inside that pavilion or outside the pavilion. Holmgreen took him to the side of the pavilion, and again he was not free to go, he was restraining him, he was holding onto him. And here's Mr. Guenther who at this point in time had not done one thing wrong, had not violated one law or one ordinance for the City of Black River Falls, and yet he was being restrained by Holmgreen and was not free to move about.

It doesn't matter if he was intoxi-

cated, that had nothing to do with that. So we ask why did you place him under arrest. He was trying to get away from me and go back inside the building. There were all kinds of people back inside the building, there were people moving back and forth. If he was trying to get away from him then, then he was under arrest.

He was talking in a loud voice. you've got to understand there were 100, 200 people in around there. In order to hear one another, you've got to talk in a loud voice.

The part about putting him in the hospital, I think based upon Officer Newell's testimony that statement occurred after he was placed under arrest, it's right in his written report, he read right off the record. That was after he made the arrest for disorderly conduct. So he

came to the conclusion that Mr. Guenther was disorderly because he didn't do what he said -- what the officer said, and the officer wanted him to stand put, that's why he was arrested for disorderly conduct and that's not within the statute -- not what the statute says. He didn't cause or provoke any disturbance. The whole disturbance began when Oppelt swung and hit him in the face, and he did nothing from tht point on until Holmgreen then escalated the whole thing, grabbed him, dragged him out of the building, put him up against the wall. The officers came. Everything was blown out of proportion by Mr. Holmgreen and the subsequent act of Holmgreen and the other officers.

It's our contention that this was an illegal arrest for disorderly conduct, does not fall within the meaning of the

statutes albeit any element of the statutes [sic]; therefore, the court does not have any personal jurisdiction over Mr. Guenther.

The arrest for resisting becomes illegal, any statements that were made by Mr. Guenther becomes suppressable, and we would ask that you grant our motion.

MR. MCQUILLAN: Your Honor, if I might, I would agree with Mr. Mubarak's basic statment of the law, that being that if there was not probable cause for the arrest, then everything else fails. I'm not going to argue the facts, the court is aware of those. My interpretation would obviously be different than his.

It seems to me that what happened here was that with or without provocation Mr. Oppelt struck Mr. Guenther. The police, primarily being peace keepers, as

they are required to be under the law, intervened to keep the matter from escalating. Mr. Spangler and Olson restrained Mr. Oppelt. Mr. Holmgreen and Mr. Newell took Mr. Guenther outside. He was not under arrest at that time. Mr. Holmgreen wanted to separate the parties, wanted to get Mr. Guenther away from his attacker, wanted to find out what had happened, why it had happened and if Mr. Guenther would be willing to press charges against his assailant.

Mr. Guenther, perhaps because he was under the influence, perhaps because he was outraged by having been assaulted, as most of us would have been I'm sure, was not using his best judgment in my opinion and felt that things would be better handled if he were allowed to reenter the building and take care of his own busi-

ness. He was cautioned several times not to do that. He was not free to go back into the building and the reason is obvious.

He was free to leave, he was free to go home with his wife, do whatever, he was free to make a complaint, but once the police had intervened there was no longer any argument of self defense. The police were there, that is their function to maintain public peace.

Mr. Guenther has been charged under the provisions of Chapter 947, which interestingly is entitled a public peace chapter. The basis for disorderly conduct is that Mr. Guenther tried to go around, if not through and over, the police to get back at his assailant. He was loud, he was vulgar, he was threatening. Those are all facts to be considered. The crowd was

there, they were ugly. And as Mr. Guenther subsequently told Officer Newell he should have listened to Officer Holmgreen, taken his advice, and he would have kept himself out of this mess.

So the bottom line is that he should have let the police handle it, they were there to take care of it. There was no longer a need for self action. When he tried to go back into the building to take justice into his own hands, the police had no choice but to arrest him for attempting to breach the peace, and that is the basis for the disorderly conduct.

THE COURT: The court will now address myself to the motion to dismiss on the basis of no probable cause and an unlawful arrrest. I won't recount all of the facts, but the facts do show that Mr. Guenther got hit by Mr. Oppelt, that this

was an explosive situation. The officer got between them, took Mr. Oppelt away. He then escorted Mr. Guenther outside. During this period of time there Mr. Guenther was loud, he was vulgar, he was hostile, he was yelling. Mr. Holmgreen is in uniform. And this was a very explosive type situation, other items that I won't recount.

He finally places him under arrest, tells him to go to the squad car. The court finds that there's an ample record there, I won't recount all of the testimony there, it's amply supported for the resisting, and, therefore, the motion is denied. Thank you all.

(2:05 p.m.)

* * * * *